the circumstances of the particular case. Presumptions of fact must not be drawn automatically, or, as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised. Even, with regard to presumptions of law, Devlin L.J. said recently in *Berry* v. *British Transport Commission* [4]:—

". . . Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable — in the sense that 'estoppels are odious', and the 'doctrine should never be applied without a necessity for it'; *per* Bramwell L.J. *Baxendale* v. *Bennett* [5] — because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own."

Finally, as to the order made after conviction in this case, I think it is well for magistrates again to refresh their memory by referring to the observations of Thomson J. (as he then was) in *Public Prosecutor* v. *Idris* [6] regarding sections 173A and 294 of the Criminal Procedure Code.

This appeal is allowed; the conviction is quashed and the order under section 173A set aside.

Appeal allowed.

Solicitors: *Bannon & Bailey.*

MUTHIAH CHETTIAR v. JAGAT SINGH

[O.C.J. (Ong J.) March 10, 1962]

[K.L. — Originating Summons No. 137 of 1961]

Money and Moneylending — Charge as security — Note or memorandum given to chargee in compliance with s.16 of the Moneylenders Ordinance, 1951 — Omission in memorandum to set out powers of chargee contained in Land Code — Effect of — Whether these powers "terms" of the charge.

Section 16(3) of the Moneylenders Ordinance, 1951 requires, *inter alia*, that a note or memorandum of the contract containing all the terms of the contract, and where it is a term of the contract that a particular security be given in respect of it, the particulars of that security either in terms or by reference to, to be given by the chargee to the chargor.

In a question whether there was sufficient incorporation of the "terms" of the security in the note or memorandum by a bare reference therein to the charge without specific mention of the various powers and remedies given to a chargee by the Land Code,

Held: as only terms arising by express stipulation in the security must be included in the note or memorandum of the contract but no more, the note or memorandum in this case sufficiently complied with section 16(3) of the Ordinance and the security is enforceable.

Cases referred to:—

(1) *Mitchener* v. *Equitable Investment Co. Ltd.* [1938] 1 All E.R. 303, 304-5.

(2) *Central Advance and Discount Corporation Ltd.* v. *Marshall* [1939] 3 All E.R. 695.

(3) *Abirami Ammal* v. *M.S.M.M. Meyappa Chettiar* [1959] M.L.J. 149, 151.

(4) *Reading Trust Ltd.* v. *Spero* [1930] 1 K.B. 492.

ORIGINATING SUMMONS.

L. P. Thean for the applicant.

K. Chelvanayagam for the respondent.

Cur. Adv. Vult.

Ong J.: The applicant, as chargee of certain land in Kuala Lumpur, of which the respondent is the registered proprietor, took out this originating summons calling on the respondent to show cause why such land should not be sold by public auction to satisfy the principal sum and interest due under the charge. The application is resisted by the respondent.

The applicant is, and at all material times was, a licensed moneylender to whom the Moneylenders Ordinance, 1951 applies. On December 28, 1959, he lent the respondent a sum of $9,000 bearing interest at 12 per cent. per annum. The loan was secured by a charge executed in the form prescribed by Schedule XIV(a) of the Land Code. In intended compliance with the provisions of section 16 of the Ordinance a note or memorandum of the contract was given to, and its receipt acknowledged by, the respondent as borrower, before the money was lent or the charge executed, but no copy of the charge was supplied to the respondent. However, in the note or memorandum of the contract, particulars of the security were set out as follows:

"The borrower shall before the receipt of the abovementioned sum of $9,000 (Dollars Nine thousand only) execute in favour of the lender a memorandum of charge over the land held under Certificate of Title No. 11,571 Lot No. 637, section 46 in the Town and District of Kuala Lumpur, containing an area of 1 acre 1 rood 00.7 pole as security for the repayment of the same and interest thereon as aforesaid."

The case for the respondent is that, by reason of the applicant's omission to deliver to him a copy of the charge together with the note or memorandum of the contract, the security is unenforceable because the note or memorandum failed to set out "all the terms of the contract" in strict compliance with the provisions of section 16(3) of the Ordinance. The subsection reads as follows:

"(3) The note or memorandum aforesaid shall contain all the terms of the contract and in particular shall show separately and distinctly —

(a) the date of the loan;

(b) the principal; and

(c) the rate of interest per centum per annum payable in respect of such loan or, where the rate is not expressed in terms of a rate per centum per annum, the rate of such interest."

It was not suggested that in all other respects, except as to the terms of the security, there was an insufficient compliance with the requirements of subsection (3). But, relying on the analogy presented in *Mitchener* v. *Equitable Investment Co. Ltd.* [1], it was contended that the note or memorandum did not even by reference, could it be said to have set out the several powers and remedies given to a chargee by sections 135, 136, 137 and 138 of the Land Code in case of default by the chargor. In *Mitchener's*

case the plaintiff had borrowed money from the defendants who were moneylenders, and the memorandum merely set out that the loan was secured by a bill of sale on the plaintiff's furniture, but no copy of such bill of sale was delivered to him. The statutory form of such a bill of sale sets out that personal chattels thereby assigned shall not be liable to seizure for any other than five specified causes. In an action by the plaintiff for a declaration that the contract was unenforceable, Lawrence J. said:

"... though it is perfectly clear that a person who had before him a copy of the memorandum which stated that the loan was secured by a bill of sale would know, if he knew the law, as he is bound to know it, that no other power of seizure than one of those specified in section 7 of the Act could be incorporated, he would not know which power of seizure was incorporated in the bill of sale unless he saw the bill of sale. As those powers of seizure and sale are most material for the borrower to know, in my judgment it is an infringement of section 6 of the Moneylenders Act, 1927, not to specify in the Memorandum the power of seizure and sale which the bill of sale referred to in the memorandum contains."

In *Central Advance and Discount Corporation Ltd.* v. *Marshall* [2], repayment of a loan was secured by a bill of sale executed by the borrower together with a guarantee executed by guarantors. The guarantee contained a clause providing that, in the event of the bill of sale being or becoming invalid or inoperative in whole or in part, the guarantors would on demand pay the lenders the amount of the loan and interest or the unpaid part thereof. The memorandum of the contract mentioned the bill of sale and the guarantee, but did not disclose the above clause. It was held that, the guarantee being a security within the meaning of section 6 of the Moneylenders Act, 1927, the clause was one which imposed a further liability on the borrower, and was therefore a term of the contract which should have been set out in the memorandum, and its omission rendered the contract unenforceable.

I do not think it necessary to discuss in detail the various other authorities cited by counsel for the respondent, which were decisions turning on the particular facts of each case. An exegesis of section 16 of our Ordinance is contained in the judgment of Thomson C.J. in *Abirami Ammal* v. *M.S.M.M. Meyappa Chettiar* [3], as follows:

"Section 16 of the Ordinance clearly differentiates between the contract for the repayment of the loan and any security given in respect of that contract and it is of the contract that the note or memorandum must be delivered. That note or memorandum is required to contain all the terms of the contract and where it was a term of the contract that a particular security be given in respect of it, the particulars of that security would require to be stated either in terms or by reference (see *Reading Trust Ltd.* v. *Spero* [4]). Nevertheless the Ordinance treats the contract and the security in respect of it as separate and distinct things. There may be a contract without security; there may be a contract with security. In either case the note or memorandum must embody the terms of the contract and in the latter case it must also embody in one way or another the terms of the security."

The real question for determination in the present case is: whether there is a sufficient incorporation of the "terms" of the security in the note or memorandum by a bare reference therein to the charge, without specific mention of the various powers and remedies given to a chargee by the Land Code. In my view the answer turns on the interpretation of what constitutes a "term" of the charge. Now, in all States in the Federation of Malaya to which the Land Code applies, a Memorandum of Charge can only be executed by the registered proprietor of land in accordance with the provisions of Part X of the Code and in one of the forms prescribed in Schedules XXIV(a) to (e). In Schedule XXIV(a), after the recital, there appears, in the first paragraph, the stipulation as to repayment of the principal sum; in the second paragraph, the stipulation as to rate and payment of interest; then a third paragraph, in blank, as to which the footnote says: "Here set forth special stipulations if any"; and finally, the operative words of the charge, concluding with a statement of the legal effects thereof, viz., "And subject to the aforesaid the said (chargee) shall be entitled to all the powers and remedies given to a chargee by the Land Code." In all the prescribed forms (a) to (e) of Schedule XXIV the legal effects and consequences of a charge over land are stated in similar words.

Are the powers and remedies given to a chargee in case of default "terms" of the security like the terms of any contract? In my opinion the answer plainly is, no. Those powers and remedies are necessary concomitants of a charge. They are the legal consequences flowing from default by the chargor in the performance or observance of any of the terms and conditions stipulated in the Memorandum of Charge. They are the intrinsic qualities or attributes of a charge which are no more separable from it than is a durian from its thorns. They do not arise *ex contractu*, but by operation of law, as inevitably as when the property in goods passes from vendor to purchaser upon a sale over the counter.

It is further to be emphasised that what subsection (3) requires to be set out in the note or memorandum are the "terms of the contract", as distinct from a statement of all the rights and obligations of chargor and chargee. Rights and obligations which arise by operation of law clearly cannot be said to come within the scope of those words. If, as the respondent contends, there ought to be set out, in the note or memorandum of the contract, the powers and remedies given to the chargee under sections 135 to 138 of the Land Code, then, by the same token, any note or memorandum which even sets out those four sections must still be defective unless there is also specific reference to section 133 relating to implied agreements by a proprietor of land charged, which proposition, is manifestly absurd. In short, my view is that only terms arising by express stipulation in the security must be included in the note or memorandum of the contract but no more.

I am fortified in this view by certain *dicta* in the judgment of Scrutton L.J. in *Spero's case* [4], at page 505, where he said:

"It seems clear in section 6 that the Legislature, while requiring a copy of the contract to be signed, has not required a copy of the security to be sent to the borrower, and it may need consideration whether if there is a more onerous term in the security than in the contract, the note of the contract may not be incomplete. I am disposed to think that where the contract contemplates a promissory note as security and there is a promissory note in the ordinary form, not contradicting the contract, the fact that the contract does not set out the terms of the promissory note will not invalidate the contract. It may be otherwise if the security contains an onerous term not in the contract."

Again, in *Marshall's case* [2] at page 696, Clauson L.J. said:

"The Act does not require the terms of a security to be set out in the memorandum, but, if the effect of the security is that a liability different in any respect to that described in the memorandum is, or may be, directly or indirectly imposed on the borrower, this further liability must appear in the memorandum."

For the above reasons, I am of opinion that the note or memorandum in this case sufficiently complied with the provisions of subsection (3) of section 16 of the Ordinance, and the security is enforceable. Accordingly there will be an order as prayed, with costs against the respondent.

Order as prayed.

Solicitors: *Shook Lin & Bok; K. Chelvanayagam.*

CHINNAKARAPPAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) March 11, 1962]

[J.B. — Criminal Appeal No. 4 of 1962]

Criminal Law and Procedure — Bail — Whether magistrate had considered relevant factors — Bailable and non-bailable offences — Criminal Justice Ordinance, 1953, ss.2, 5 — Effect of — Bailable or non-bailable — Whether penal servitude under Criminal Justice Ordinance means imprisonment for life as in the Criminal Procedure Code, (Cap. 6), ss.2, 301, 388.

Penal Code, s.326 — Grievous hurt with dangerous weapon.

A magistrate has no power to grant bail in cases punishable with death or life imprisonment, but if the effect of section 2 of the Criminal Justice Ordinance was to permit in proper cases persons to be released on bail in all non-bailable cases other than those punishable with death, then in this case the learned magistrate had considered the matter judicially and exercised his discretion properly.

The words "penal servitude for life" where they appear in the Criminal Procedure Code must be interpreted as meaning "imprisonment for life" in view of section 2 of the Criminal Justice Ordinance. *R.* v. *Chan Choon Weng & Ors.* [2] followed. *Ad'at bin Taib* v. *Public Prosecutor* [1] dissented from.

Cases referred to:—

(1) *Ad'at bin Taib* v. *Public Prosecutor* [1959] M.L.J. 245.

(2) *R.* v. *Chan Choon Weng & Ors.* [1956] M.L.J. 81.

CRIMINAL APPEAL.

Robert Yap for the appellant.

Syed Othman bin Ali (Deputy Public Prosecutor) for the respondent.

Adams J. (delivering oral judgment): This is an appeal against the refusal of the learned magistrate, Johore Bahru, to grant bail to the accused who stands charged with an offence under section 326 of the Penal Code, that is to say voluntarily causing grievous hurt by a dangerous weapon.

In his grounds of decision which I can only describe as admirable, the learned magistrate has quite clearly applied his mind with the greatest care to all the factors that go towards the granting of bail and which are set out with clarity in *Mallal's Criminal Procedure,* 4th Edition, at page 551. The learned magistrate points out that the offence is extremely serious and that the Court Inspector had said that the victim's arm was severed and had to be amputated. The learned magistrate then goes on to say that he considered that there was a possibility that the offence might be repeated if the accused were released on bail and that the witnesses might well be tampered with.

The learned magistrate then goes on to deal with a further application for bail made before him by Mr. Robert Yap of counsel who referred the magistrate to a judgment of Neal J. in *Ad'at bin Taib* v. *Public Prosecutor* [1]. The learned judge says: "In my opinion, the effect of Ordinance No. 14 of 1953 in practice is that the only non-bailable offences are those punishable with death." The learned magistrate was unable with respect to follow that *dictum,* and preferred to follow the decision of Spencer Wilkinson J. in *Reg.* v. *Chan Choon Weng & Ors.* [2].

With respect to the learned judge in *Ad'at's case* I do not agree that the only non-bailable offences since the passing of the Criminal Justice Ordinance, No. 14 of 1953, are those punishable with death.

A "bailable offence" is defined in section 2 of the Criminal Procedure Code as an offence shewn as bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force and "non-bailable offence" means any other offence. The offence of voluntarily causing grievous hurt by dangerous weapons or means under section 326 of the Penal Code is shown in the First Schedule to the Criminal Procedure Code to be non-bailable. I do not see how the Criminal Justice Ordinance, 1953, affects the position at all.

That being the case and therefore bail (subject to what I have to say in a minute as to whether it in fact can be granted in a case of this nature) being discretionary, it is manifestly clear that the learned magistrate has carefully applied his mind to the question of whether or not bail should be granted, he has applied his mind to the problem and has exercised his discretion judicially. In the event he has refused to grant bail on substantial grounds.

As to whether or not bail can be granted in cases of this nature, there is apparent conflict between Spencer Wilkinson J. in *Reg.* v. *Chan Choon Weng & Ors.* and Neal J. in *Ad'at bin*